Supreme Court, U. S.
FILED
MAY 21 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1689

MAYFAIR CONSTRUCTION CORP.,

Petitioner,

-against-

FREDDIE BODRICK, ALLEN CORBETT, WILEY C. DUNBAR, JOSEPH T. DOBIE, MARION JAMES HOLLINS, HUBERT LAWTON, LARRY LYTTLE, MELVIN PLUMMA, WILLIE REYNOLDS, WILLIAM BAKER, FRANK BRISBANE, JAMES BRISBANE, SR., JAMES A. BRISBANE, JR., MARION CALDWELL, RODELL GRAHAM, JOSEPH N. GRAHAM, MANFORD GREGORY, JAMES HARRIS, MATTHEW HAZELTON, HEROD JONES, ROBERT E. LaROY, CHARLES LUTTREL, JR., WILLIE A. MARCHELL, SAMUEL MARSHALL, PAUL MILLER, CHARLES PEAY, LEO ROBINSON, NEAL WILLIAMS, and other employees of petitioner similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

SAMUEL KIRSCHENBAUM
DREYER AND TRAUB
Counsel for Petitioner
90 Park Avenue
New York, N.Y. 10016

THOMAS CHARLES LAMBERT
Of Counsel

DICK BAILEY PRINTERS, 290 Richmond Ave., Staten Island, N.Y. 10302
Telephone: (212) 447-5358

TABLE OF CONTENTS

Page

Opinions below 2

Jurisdiction 2

Questions presented 2

Statutes, federal rules, and regulations involved 4

Statement of the case 5

Reasons for granting the writ 12

Conclusion 15

Appendix

Order of the trial court 1a

Decision of the trial court 4a

Opinion of the trial court 5a

Order of the Appellate Division 9a

Opinion of the Appellate Division 10a

Order of the Appellate Division granting leave to appeal to the Court of Appeals 11a

Majority memorandum opinion, dissenting opinions and order of the Court of Appeals 13a

1964 *Code of Federal Regulations*, Title 29, Part 5: "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction" 21a

CITATIONS

Cases:

	Page
Choy v. Farragut Gardens, Inc., 131 F.Supp. 609 (S.D.N.Y. 1955)	9,13,14
Farmer v. Philadelphia Electric Co., 329 F.2d 3 (3d Cir. 1964)	9
Filardo v. Foley Bros., 297 N.Y. 217, 78 N.E.2d 480 (1948) *rev'd* 336 U.S. 281 (1949)	10,12,13
Hahn v. Gottlieb, 430 F.2d 1243 (1st Cir. 1970)	9,14
Martinez v. Phillips Petroleum Co., 283 F.Supp. 514 (E.D. Idaho 1968) *aff'd* 424 F.2d 547 (9th Cir. 1970)	10,13
Perkins v. Lukens Steel Co., 310 U.S. 113 (1940)	9,13,14
United States v. Lovknit Mfg. Co., Inc., 189 F.2d 454 (5th Cir.) *cert. den.* 342 U.S. 896 (1951) *reh. den.* 342 U.S. 915 (1952)	8,13

Statutes and Regulations:

	Page
Administrative Procedures Act, 5 U.S.C. §§701, *et seq.*	7
Bacon-Davis Act, 40 U.S.C. §276a-2(b)	8
1964 Code of Federal Regulations, Title 29, Part 5	
29 CFR §5.1	5,21a
29 CFR §5.6(a)	5,22a
29 CFR §5.6(b)	5,6,22a
29 CFR §5.6(d)	5,6,23a
29 CFR §5.6(e)	5,6,23a
29 CFR §5.7	5,6,24a
29 CFR §5.8	5,25a
29 CFR §5.9	5,6,25a
29 CFR §5.10	5,26a
29 CFR §5.11	5,27a

Statutes and Regulations (cont'd)

	Page
Community Mental Health Centers Act, 42 U.S.C. §2685(a)(5)	12
Contract Work Hours Standards Act, 40 U.S.C. §328(b)(2)	8
Fair Labor Standards Act, 29 U.S.C. §216(b)	8
Federal Airport Act, 49 U.S.C. §1114	12
Federal Civil Defense Act of 1950, 50 U.S.C. Appx. §2281(h)	12
Federal Water Pollution Control Act, 33 U.S.C. §1372	12
Health Professions Educational Assistance Act of 1963, 42 U.S.C. §§292d(c)(4), 293a(c)(5)	12
Higher Educational Facilities Act of 1963, 20 U.S.C. §753	12
Hospital Survey and Construction Act, 42 U.S.C. §291e(a)(5)	12
Library Services and Construction Act, 20 U.S.C. §355	12
Mental Retardation Facilities Construction Act, 42 U.S.C. §§295a(a)(2)(D), 2662(a)(5), 2675(a)(5)	12
National Housing Act (12 U.S.C. §§1701, *et seq.*)	2,5,8,12,14
12 U.S.C. §1715b	3,5
12 U.S.C. §1715c(a)	2,4,5
12 U.S.C. §1715c(b)	3,5
Walsh-Healy Act, 41 U.S.C. §35	8,14

PETITION

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1975

MAYFAIR CONSTRUCTION CORP.,

Petitioner,

-against-

FREDDIE BODRICK, ALLEN CORBETT, WILEY C. DUNBAR, JOSEPH T. DOBIE, MARION JAMES HOLLINS, HUBERT LAWTON, LARRY LYTTLE, MELVIN PLUMMA, WILLIE REYNOLDS, WILLIAM BAKER, FRANK BRISBANE, JAMES BRISBANE, SR., JAMES A. BRISBANE, JR., MARION CALDWELL, RODELL GRAHAM, JOSEPH N. GRAHAM, MANFORD GREGORY, JAMES HARRIS, MATTHEW HAZELTON, HEROD JONES, ROBERT E. LaROY, CHARLES LUTTREL, JR., WILLIE A. MARCHELL, SAMUEL MARSHALL, PAUL MILLER, CHARLES PEAY, LEO ROBINSON, NEAL WILLIAMS, and other employees of petitioner similarly situated,

Respondents.

Petitioner prays that a writ of certiorari issue to review the final order of the Court of Appeals of the State of New York entered on February 26, 1976.

OPINIONS BELOW

The opinion of the Supreme Court of the State of New York in and for the County of New York is not officially reported and is printed in the Appendix hereto beginning at page 5a. The opinion of the Appellate Division of the Supreme Court of the State of New York in and for the First Judicial Department is reported at 44 A.D.2d 520, 353 N.Y.S.2d 158 and is printed in the Appendix hereto at page 10a. The majority memorandum opinion and dissenting opinions of the Court of Appeals of the State of New York are not yet reported and are printed in the Appendix hereto beginning at page 12a.

JURISDICTION

The order of the Court of Appeals of the State of New York was made and entered on February 26, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

The *National Housing Act* (12 U.S.C. §§1701 *et seq.*) provides, in part (in §1715c(a)), that the head of the federal administrative agency in charge of administering and enforcing the Act " . . . shall not insure . . . a mortgage . . . unless the principal contractor files a certificate . . . certifying that the laborers . . . employed in the construction . . . have been paid not less than the wages prevailing in the locality . . . as determined by the Secretary of Labor . . . .".

I.

The first question presented is:

Does the *National Housing Act* give to employees of a contractor whose mortgage is insured under the Act, a cause of action against the contractor which may be prosecuted in a private lawsuit in state court for the alleged difference between the wages paid to the employee pursuant to his employment contract with the contractor and the "wages prevailing in the locality . . . as determined by the Secretary of Labor . . . ."?

The holding of the New York Court of Appeals answered this question in the affirmative.

II.

The second question presented is:

Where, pursuant to its powers under the *National Housing Act* (12 U.S.C. §§1715b and 1715c(b)) and regulations thereunder (29 C.F.R. Part 5), the Federal Housing Administration (now the Department of Housing and Urban Development), prompted by employee complaint, has made an investigation, including review of the employer's payroll, and has made a determination and award of restitution to the employees of the difference between what they were paid and the "prevailing wages" under the Act, which award has admittedly been complied with and paid to the employees, does a state court have jurisdiction thereafter to entertain the same complaint (for the alleged difference between the wages they were paid and "prevailing wages") where the employees, who had counsel throughout, (1) made no objection to the administrative determination and award, (2) made no at-

tempt to obtain a further administrative remedy, (3) made no attempt to appeal or obtain review of the administrative determination and award and (4) brought no proceeding in the nature of mandamus?

The holding of the New York Court of Appeals answered this question in the affirmative.

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

National Housing Act 12 U.S.C. §1715c(a) (1964) reads as follows:

> The Commissioner shall not insure under section 1713 or 1715a or 1743 of this title, pursuant to any application for insurance filed subsequent to the effective date of this section, or under section 1715e of this title, or under subchapter VII of this chapter pursuant to any application filed subsequent to sixty days after April 20, 1950, or under section 1748b or 1748h-2 or subchapter VIII of this chapter, or under section 1750g of this title, a mortgage or investment which covers property on which there is or is to be located a dwelling or dwellings, or a housing project, the construction of which was or is to be commenced subsequent to such date, unless the principal contractor files a certificate or certificates (at such times, in course of construction or otherwise, as the Commissioner may prescribe) certifying that the laborers and mechanics employed in the construction of the dwelling or dwellings or the housing project involved have been paid not less than the wages prevailing in the locality in which the work was performed for the corresponding classes of laborers and mechanics employed on construction of a similar character, as determined by the Secretary

> of Labor prior to the beginning of construction and after the date of the filing of the application for insurance.

1964 *Code of Federal Regulations* Title 29, Part 5, §§5.1, 5.6(a), 5.6(b), 5.6(d), 5.6(e), 5.7, 5.8, 5.9, 5.10 and 5.11 appear in the Appendix hereto beginning at page 20a.

STATEMENT OF THE CASE

At various times between August 29, 1962 and May 6, 1964, each of the respondents was employed by the petitioner to work on a construction project in Manhattan with respect to which the petitioner-employer had obtained a mortgage loan which was insured by the Federal Housing Administration (now the Department of Housing and Urban Development) pursuant to the provisions of the *National Housing Act*, 12 U.S.C. §1701 *et seq.* Through their attorney the respondents-employees complained to the Federal Housing Administration that they had not been paid the "prevailing wages" which they claimed were required by *National Housing Act*, 12 U.S.C. §1715c(a), which reads in relevant part as follows:

> The Commissioner [now the Secretary of Housing and Urban Development] shall not insure . . . a mortgage . . . unless the principal contractor files a certificate . . . certifying that the laborers . . . employed in the construction . . . have been paid not less than the wages prevailing in the locality . . . as determined by the Secretary of Labor . . . .

Under the regulations promulgated by the Secretary of Labor pursuant to *National Housing Act* 12 U.S.C. §§1715c(b) and 1715b, the federal administrative agency is required to ". . . make such examination of the certified

payrolls and statements as may be necessary to assure compliance with the labor standards . . . .". 29 C.F.R. §5.6(d). The regulations further provide, 29 C.F.R. §5.6(e),:

> In addition to the examination of payrolls and statements required by paragraph (d) of this section, the Federal agency shall cause investigations to be made as may be necessary to assure compliance with the labor standards . . . .Such investigations shall include interviews with employees and examinations of payroll data to determine the correctness of classifications and disproportionate employment of laborers, helpers or apprentices. Complaints of alleged violations shall be given priority and statements, written or oral, made by an employee shall be treated as confidential and shall not be disclosed to his employer without the consent of the employee.

Among the powers of enforcement given to the federal agency, including contract termination (29 C.F.R. §§5.7(a) and 5.7(d)), three-year ineligibility (29 C.F.R. §5.6(b)), blacklisting (29 C.F.R. §5.6(b)), criminal prosecution (29 C.F.R. §5.9(b)) and others, the regulations provide (29 C.F.R. §5.9(a)) that:

> The Agency Head may, in appropriate cases where violations of . . . the applicable statutes listed in §5.1 resulting in underpayment of wages to employees are found to be nonwilful, order that restitution be made to such employees.

Pursuant to its powers and duties, the Federal Housing Administration conducted an investigation which included interviews and a review of petitioner's payroll records and the Administration determined that none of the plaintiffs

had been paid the appropriate prevailing wage. As a result the Commissioner of the Administration ordered that appropriate restitution be made to the employees. It is conceded that these payments were made by petitioner's certified checks which, in accordance with Administration procedure, were sent to the Administration, which in turn mailed the checks to the individual employees together with a letter of transmittal. These form letters of transmittal read as follows:

> Enclosed is a check in the amount of drawn payable to you by your employer at the above named project. The sum represents a reimbursement to you of wages inasmuch as payroll records prepared by your employer indicated that you were paid at an hourly rate less than the rate established for this project by the Secretary of Labor.
>
> This Administration has been in charge of the examination of payroll records for this project and has determined that the check in the amount stated is proper compensation for your work.

All of these checks were accepted and promptly cashed and in some but not all instances there appeared on the reverse side of the checks the following endorsement:

> The undersigned acknowledges and agrees that the acceptance of this check constitutes payment in full and a complete and general release of all claims against [petitioner].

Neither the respondents nor their attorney made any objection to this determination and award; they made no attempt to obtain a further administrative remedy; and they made no attempt to appeal or obtain review of the administrative determination and award pursuant to the *Administrative Procedures Act* 5 U.S.C. §§701 *et seq.*

Less than one week after these checks were sent out, the

respondents commenced this action against the petitioner in state court for the alleged difference between the wages they were paid and the "wages prevailing in the locality . . . as determined by the Secretary of Labor" basing their cause of action upon the above-quoted provision of the *National Housing Act.*

After answering the complaint and asserting the affirmative defenses of payment and release, petitioner made a motion for an order dismissing the aforesaid alleged cause of action upon the grounds, *inter alia,* that the court did not have subject matter jurisdiction and that the allegations failed to state a cause of action.

The trial court granted petitioner's motion and dismissed the alleged cause of action. The court's decision was justified upon the following:

1. No right of private suit is expressly provided in either the *National Housing Act* or the regulations promulgated thereunder. The regulations do expressly provide for other remedies and sanctions.

2. When Congress intended to provide employees with a right of private suit against their employer, Congress said so expressly as in the *Fair Labor Standards Act* (29 U.S.C. §216(b)) the *Bacon-Davis Act* (40 U.S.C. §276a-2(b)) and the *Contract Work Hours Standards Act* (formerly known as the *Eight-Hour Law*) (40 U.S.C. §328(b)(2)).

3. The *Walsh-Healy Act* (41 U.S.C. §35) is similar to the *National Housing Act* in that it provides that contracts with the United States for the manufacture of goods must contain a requirement that the contractor pay prevailing wages as determined by the Secretary of Labor. In the case of *United States v. Lovknit Mfg. Co., Inc.,* 189 F.2d 454 (5th Cir.) *cert. den.* 342 U.S. 896

(1951) *reh. den.* 342 U.S. 915 (1952), the Court held that employees have no right of private suit against their employer under the Act. The Court in *Lovknit* relied in part on *Perkins v. Lukens Steel Co.*, 310 U.S. 113 at 128 where the Supreme Court stated that the Walsh-Healy Act ". . . does not represent an exercise by Congress of regulatory power over private business or employment. . . . Congress did no more than instruct its agents . . . to fix the terms and conditions under which the Government will permit goods to be sold to it."

4. *Farmer v. Philadelphia Electric Co.*, 329 F.2d 3 (3d Cir. 1964) held that an employee may not sue his employer for damages sustained by reason of the employer's violation of the non-discrimination provision inserted by law into the employer's contract with the Government because, while the regulations do provide some remedies for violation, private court action by the employee is not among them.

5. *Choy v. Farragut Gardens, Inc.*, 131 F.Supp. 609 (S.D.N.Y. 1955) construed the National Housing Act as not providing a right of private suit by tenants against their landlord for violation by the landlord (who received assistance under the Act) of provisions of the Act relating to the determination by the Federal Housing Commissioner of the maximum chargeable rent. The court said ". . . there is nothing in Title VI of the National Housing Act, its purpose or history, which suggests that under the circumstances here presented the plaintiffs . . . were given a legal right to have the courts review and supervise the administrative function entrusted by the Congress to the Commissioner's judgment or discretion." In *Hahn v. Gottlieb,* 430 F.2d 1243 (1st Cir. 1970) the court also precluded judicial interference with the

administration of the National Housing Act.

6. The case of *Filardo v. Foley Bros.*, 297 N.Y. 217, 78 N.E.2d 480 (1948) *rev'd* 336 U.S. 281 (1949) involved construction of the old federal Eight-Hour Law which provided that overtime work by laborers on Government jobs was to be permitted upon compensation at not less than one and one-half times the employee's basic rate of pay. The New York Court of Appeals held that there was implied in this statute a right of private suit by the employee against his employer for the appropriate overtime wage. The U.S. Supreme Court reversed the Court of Appeals on other grounds stating expressly, 336 U.S. at 291, that in view of its decision on other grounds, it was unnecessary to decide the question of implied right of private suit. Thereafter the federal court in *Martinez v. Phillips Petroleum Co.*, 283 F. Supp. 514 (E.D. Idaho 1968) *aff'd* 424 F.2d 547 (9th Cir. 1970) held that the old Eight-Hour Law did *not* imply a right of private suit by the employee against his employer. The trial court in the instant case distinguished the holding of the Court of Appeals in *Filardo* that there can be no right without a remedy on the grounds that in this case there obviously was another remedy, namely restitution awarded by the Federal Housing Administration.

On Appeal to the Appellate Division, First Department, however, the New York intermediate appellate court reversed, basing its decision on the *Filardo* case, stating that ". . . its principle has not been discredited by the Federal courts" notwithstanding the fact that the *Martinez* case, *supra*, held directly *contra Filardo*.

Petitioner then moved the Appellate Division for leave to appeal to the New York Court of Appeals on the grounds that ". . . it would be beyond candid appraisal of the law to

deny that the question presented upon the appeal was a novel question involving law which has not been uniformly settled and involving an issue the determination of which is essentially important to an understanding by our citizenry of the application and interpretation of [certain] federal statutes." The Appellate Division granted petitioner's motion and certified to the Court of Appeals the question of whether the cause of action pleaded in the complaint was "dismissible as a matter of law."

On appeal to the Court of Appeals, five of the seven Judges affirmed the Appellate Division decision and answered the certified question in the negative stating in a two-sentence memorandum that the remedies prescribed in the regulations were not exclusive and that therefore ". . . aggrieved employees were empowered to enforce, by private litigation, the benefits afforded them under the National Housing Act. . . ."

In a lengthy dissenting opinion Judge Jason voted to reverse the Appellate Division decision and dismiss the cause of action because of lack of the necessary subject matter jurisdiction, stating:

> Since the prosecution of the lawsuit would necessarily call into question the correctness of the FHA Commissioner's 1964 determination, made under the authority of federal statute and regulation, our state courts are not empowered to review such authorized federal determinations.

Judge Jason found it therefore "unnecessary to decide whether aggrieved employees who had neither sought nor received a FHA determination would be entitled to maintain a private action by an extension of the Court's rationale in *Filardo v. Foley Bros.*" Chief Judge Breitel concurred with Judge Jason's dissent and added that the respondents are estopped by their failure to exhaust their federal administrative remedies.

REASONS FOR GRANTING THE WRIT

The *National Housing Act* is by no means the only statute of the United States under which the granting of federal aid or assistance is conditioned upon compliance by the recipient with a requirement that the recipient assure, or certify to, the Government that those who work for him are paid "not less than the wages prevailing in the locality . . . as determined by the Secretary of Labor." Other such statutes, which are almost identical in language, presently include the *Federal Water Pollution Control Act*, 33 U.S.C. §1372, *Library Services and Construction Act*, 20 U.S.C. §355, *Higher Educational Facilities Act of 1963*, 20 U.S.C. §753, *Community Mental Health Centers Act*, 42 U.S.C. §2685(a)(5), *Mental Retardation Facilities Construction Act*, 42 U.S.C. §§295a(a)(2)(D), 2662(a)(5), 2675(a)(5), *Health Professions Educational Assistance Act of 1963*, 42 U.S.C. §§292d(c)(4), 293a(c)(5), *Federal Civil Defense Act of 1950*, 50 U.S.C. Appx. §2281(h), *Federal Airport Act*, 49 U.S.C. §1114, *Hospital Survey and Construction Act*, 42 U.S.C. 291e(a)(5), and these are only a fraction of the list.

Resolution by this Court of the first question presented will therefore affect the rights not only of the multitudinous number of recipients of assistance under the *National Housing Act* and their employees but also the even greater number of recipients of aid and assistance (and their employees) under many other federal statutes.

The first question presented has not been resolved by the United States Supreme Court. However, the Court has previously expressed its awareness of the importance of the question by granting certiorari in the *Filardo* case discussed, *supra*, at page 10, item 6. The Court granted

certiorari but, upon review, was compelled to decide the case on an unrelated question. Supreme Court review of the question is no less appropriate in this case.

An examination of a U.S. Supreme Court case which does have a bearing on the question presented indicates that the New York Court of Appeals has decided this case in a way which is probably not in accord with such relevant Supreme Court decision. See the discussion of the *Perkins* case at page 8, item 3, *supra*, and page 14, *infra*.

Furthermore, the holding by the New York Court of Appeals in this case contravenes the federal court decisions in the *Lovknit*, *Choy* and *Martinez* cases which last case expressly rejected the New York Court of Appeals *Filardo* case holding upon which the New York appellate courts have placed such great reliance in the instant case. See the discussion of these cases *supra*, at pages 8-10, items 3, 5 and 6. There is a serious conflict between state and federal court decisions on the question.

The second question presented by this case is equally important because the present holding effectively permits state courts to entertain *nisi prius* the same factual issues as were previously determined by a federal administrative agency expressly given jurisdiction over the issues by Congress. It will permit inconsistent determinations of the same complaint by a federal agency on the one hand and a state court on the other, notwithstanding that the state courts have not been given appellate jurisdiction, that the aggrieved employee has not exhausted his administrative remedy and that he has not sought review of the administrative determination.

The guidance of the U.S. Supreme Court on this important second question is necessary to resolve the serious conflict of authority which has arisen.

The New York Court of Appeals, declaring the law for its state, has held that where the administrative remedy is not expressly stated to be "exclusive", the employee can bring the same complaint in the first instance to the courts or the administrative agency *or both.*

This does not appear to be in accord with either federal authority precluding judicial interference with the administration of the *National Housing Act* (see the *Choy* and *Hahn* cases discussed, *supra,* at page 9, item 5) or the pronouncements of the U.S. Supreme Court with respect to the *Walsh-Healy Act* in *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127, 131 (1940) as follows:

> Thus, a wage determination by the Secretary contemplates no controversy between parties and no fixing of private rights; the process of arriving at a wage determination contains no semblance of these elements which go to make up a litigable controversy as our law knows the concept. Courts have never reviewed or supervised the administration of such an executive responsibility even where executive duties "require an interpretation of the law." Judicial restraint of those who administer the Government's purchasing would constitute a break with settled judicial practice and a departure into fields hitherto wisely and happily apportioned by the genius of our polity to the administration of another branch of Government. [Footnotes omitted.]
>
> * * *
>
> If the general law permits prospective bidders to challenge each wage determination of the Secretary in the courts, by a like token all employees affected could obtain judicial review. Such a possibility places in bold relief those conditions which led Congress to proceed in this Act upon the belief, to which we have recently alluded, that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

> The case before us makes it fitting to remember that "The interference of the Courts with the performance of the ordinary duties of the executive departments of the Government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them." [Footnotes omitted.]

Involving, as it does, a question of the marking of the boundaries of permissible judicial inquiry into administrative and executive responsibilities as well as a question of the existence of a significant right under a federal statute typical of many others, it is respectfully submitted that this case is a peculiarly appropriate one for the exercise of the U.S. Supreme Court's jurisdiction to review.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

SAMUEL KIRSCHENBAUM
DREYER AND TRAUB
Counsel for Petitioner
90 Park Avenue
New York, N.Y. 10016

Thomas Charles Lambert
Of Counsel

Appendix

ORDER OF THE TRIAL COURT

At a Trial Term, Part VI, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse located at Foley Square, Borough of Manhattan, City and State of New York, on the 1st day of March, 1972.

PRESENT:
Hon. Morris E. Spector,
Justice

FREDDIE BODRICK, ALLEN CORBETT, WILEY C. DUNBAR, JOSEPH T. DOBIE, MARION JAMES HOLLINS, HUBERT LAWTON, LARRY LYTTLE, MELVIN PLUMMA, WILLIE REYNOLDS, WILLIAM BAKER, FRANK BRISBANE, JR., MARION CALDWELL, RODELL GRAHAM, JOSEPH N. GRAHAM, MANFORD GREGORY, JAMES HARRIS, MATTHEW HAZELTON, HEROD JONES, ROBERT E. LaROY, CHARLES LUTTREL, JR., WILLIE A. MARCHELL, SAMUEL MARSHALL, PAUL MILLER, CHARLES PEAY, LEO ROBINSON, NEAL WILLIAMS, and other employees of defendant similarly situated,

Plaintiffs,

-against-

MAYFAIR CONSTRUCTION CORP.,

Defendant.

Defendant, having moved this Court for an order dismissing both causes of action of the complaint on the following grounds: (a) Under Section 3211 (a)(2) of the CPLR in that the Court does not have jurisdiction of the subject matter; (b) 3211 (a) (5) collateral estoppel; (c) 3211 (a) (7) that it fails to state a cause of action; and (d) for summary judgment under §3211 of the CPLR: and the said motion having duly come on before me to be heard;

NOW, upon reading and filing of defendant's notice of motion dated December 27, 1971 together with the affidavit of Leonard Litwin duly sworn to December 23, 1971, the affirmation of Manuel Taxel, Esq. dated December 23, 1971, with the pleadings and exhibits annexed thereto submitted in support of said defendant's motion and on the affidavit of Samuel Panzer, Esq. sworn to January 24, 1972, with exhibits annexed thereto in opposition to said defendant's motion and upon all the pleadings and proceedings heretofore had herein and the defendant having appeared by Dreyer and Traub, Manuel Taxel, Esq., of counsel, and Milton Horowitz, Esq., of counsel to Samuel Panzer, having appeared as attorney for the plaintiffs herein, and due deliberation having been had thereon and the Court having filed its decision,

NOW, on motion of Dreyer and Traub, attorneys for defendant, it is hereby

ORDERED that the defendant's motion to dismiss the first cause of action set forth in the complaint which alleges a claim for prevailing wages pursuant to 12 U.S.C. §1715C of the National Housing Act with respect to each of the plaintiffs be and the same is hereby granted and said cause of action with respect to each of the said plaintiffs be and the same hereby is dismissed; and it is further

ORDERED that defendant's motion to dismiss the

second cause of action set forth in the complaint for overtime compensation pursuant to the Fair Labor Standards Act 29 U.S.C. §201 to 219 with respect to each of the plaintiffs is hereby denied.

ENTER

M.E.S.
J.S.C.

Filed
March 2, 1972
New York
Co. Clerk's Office

DECISION OF THE TRIAL COURT

TRIAL TERM PART VI

Present:
Hon. Morris E. Spector
Justice.

(SAME TITLE)

Notice of Motion and Affidavits Annexed, papers numbered 1-14.

Answering Affidavits, papers numbered 15-17.

Upon the foregoing papers this motion is decided in accordance with accompanying memorandum decision.

Filed
March 2, 1972
New York
Co. Clerk's Office

Dated February 14, 1972

M.E.S.
J.S.C.

Briefs: Plaintiff's X Defendant's X 2

OPINION OF THE TRIAL COURT

(SAME TITLE)

SPECTOR, J.:

Defendant moves for dismissal of the first cause of action on the ground that plaintiffs did not have a right to bring private suit and this Court therefore does not have jurisdiction of the subject matter (CPLR 3211(a)(2); for dismissal of the second cause of action on the defense of collateral estoppel (CPLR 3211 (a)(5); for dismissal of the complaint for failure to state a cause of action (CPLR 3211 (a)(7); and for summary judgment.

Plaintiffs are a group of non-union employees who worked for defendant at varying times between August 29, 1962 and May 6, 1964 on the construction of three apartment houses in Manhattan, which were financed under the National Housing Act by an F.H.A. insured building loan. The terms of the Federal assistance required that prevailing wages, as set by the Secretary of Labor of the United States, be paid to mechanics and laborers (12 USC 1715c). The lowest prevailing wage at the time in this locality for a "laborer" was $3.95 per hour. Plaintiffs claim they were paid $2.00 to a maximum of $2.25 per hour, without time-and-one-half for overtime above 44 hours, as they allege is required by the Fair Labor Standards Act. They are suing on their first cause of action for the difference between the wages they received and what they allege they should have been paid for straight time work, and on their second cause of action for unpaid overtime.

After termination of plaintiffs' employment, the Federal Housing Administration reviewed defendant's payroll and

made an adjustment with respect to plaintiffs' wages. Defendant paid each the sum awarded by FHA by check which was transmitted in each case by a covering letter from FHA stating, "This Administration has been in charge of the examination of payroll records for this project and has determined that the check in the amount stated is proper compensation for your work". Each of the plaintiffs accepted this payment, although the summons in this action had been served at that time.

The administration and enforcement by Federal agencies of labor standards provisions applicable to construction contracts which are financed or assisted by Federal money is defined in Title 29, Subtitle A, of the Code of Federal Regulations under Reorganization Plan No. 14 of 1950. The purpose of the Plan was to achieve consistency of enforcement under all the numerous statutes which provide for labor standards. The Regulation has from time to time been amended. We are here concerned with the enforcement provisions of the Regulation at the time of plaintiffs' employment.

Prior to the amendment of Reorganization Plan 14 on September 30, 1964 (Title 29, Subtitle A, Code of Federal Regulations) the enforcement of the National Housing Act did not provide for a right of private suit by aggrieved employees. The penalty to the employer for violation of the wage payment provisions was suspension of payments [Title 29, Subtitle A, sec. 5.5(a)(2) and sec. 5.8] and ineligibility for three years to receive any other contract subject to the Federal laws set forth in sec. 5.1 of Title 29 [sec. 5.6(b)]. The Davis-Bacon Act (40 USC 276a) was specifically excluded from these enforcement provisions, reference being made to the enforcement provisions in Davis-Bacon itself.

The aggrieved employees' rights at that time were by complaint to the administrative agency [sec. 5.6(e)] and either an order of restitution of wages by the "Agency Head" if the violation were found to be non-wilful [sec. 5.9(a)] or by prosecution of the wilful violator by the Attorney General of the United States [sec. 5.9(b)]. In this case it is not clear whether the review of defendant's payroll by FHA which resulted in the additional payments to plaintiffs was the result of employee complaints or not, but it is clear that none of the plaintiffs availed themselves of an administrative remedy if they were dissatisfied with their wage adjustment.

Plaintiffs place great reliance upon Filardo v. Foley, 297 N.Y. 217, which permitted the plaintiff to recover overtime pay for work performed as a cook on a construction project in Iran during World War II. The United States Supreme Court reversed in 336 U.S. 281, only on the basis of the extraterritorially feature of the case, deliberately avoiding the question of whether or not plaintiff had the right to a private cause of action at the time. However, the case is inapplicable here, because the Davis-Bacon Act (40 USC 276a) and *not* the National Housing Act (12 USC 1715c) covered Filardo's situation. Davis-Bacon covers construction contracts where the United States is itself a party. Under the National Housing Act, the United States is a loan guarantor and the contracting parties are private individuals and institutions. Historically, the United States has legislated on labor standards with respect to its own contracts since the first Eight Hour Law in 1868, whereas regulatory legislation on working conditions in the private sector of the economy came much later, such as the Fair Labor Standards Act of 1939. Nor is the holding in *Filardo* that where there is a wrong there must be a remedy necessarily a ruling that the remedy must be in the form of

a right of the individual employee to sue. While the National Housing Act was amended in September, 1964-too late to affect these plaintiffs—so as to include the provisions of Bacon-Davis permitting private suits, the Walsh-Healy Act (41 USC 35-45), which deals with goods manufactured for use by United States Government Agencies, *still* does not permit private suits. (Willis v. E.I. DuPont, 76 F. Supp. 1010.)

There came a time, in September, 1964, when Congress decided that the individual aggrieved employee on a construction project financed with government assistance should have the right to sue his employer for the underpayment of wages as determined by the Secretary of Labor. We must recognize that before that time there was no such right to sue, or we would be declaring the 1964 amendment to the statute unnecessary. There is no indication that the additional payments made to plaintiffs after FHA audit or payroll covered overtime. The right of individual suit did exist under the Fair Labor Standards Act. (29 USC 201-219).

As to the second causes of action under the Fair Labor Standards Act for overtime pay, a question of fact exists as to whether the law applies. The criteria as to the gross annual amount of business of defendant, and whether it is or is not in interstate commerce, are matters for proof upon a trial.

Defendant's motion for dismissal of the first causes of action is granted, and denied for the second causes of action.

Settle order.

Dated: February 14, 1972.

M.E.S.
J.S.C.

ORDER OF THE APPELLATE DIVISION

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on March 12, 1974

Present Hon. Arthur Markewich Justice Presiding
Hon. Aron Steuer
Hon. George Tilzer
Hon. Myles J. Lane
Hon. J. Robert Lynch Justices

(SAME TITLE)

An appeal having been taken to this Court by the Plaintiffs-appellants from so much of an order of the Supreme Court, New York County (Spector, J.), entered on March 2, 1972, as granted defendant's motion to dismiss the first cause of action of the complaint which alleged a claim for prevailing wages pursuant to 12 U.S.C. Section 1715C of the National Housing Act with respect to each plaintiff, and said appeal having been argued by Mr. Milton Horowitz of counsel for the appellant and by Mr. Thomas C. Lambert of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the order so far as appealed from be and the same is hereby reversed, on the law, and defendant's motion to dismiss the first cause of action denied. Appellants shall recover of respondent $60 costs and disbursements of this appeal.

ENTER: Hyman W. Gamso
Clerk

OPINION OF THE APPELLATE DIVISION

(SAME TITLE)

Order, Supreme Court, New York County (Spector, J.) entered on March 2, 1972, so far as appealed from, unanimously reversed, on the law, and defendant's motion to dismiss the first cause of action denied. Appellants shall recover of respondent $60 costs and disbursements of this appeal.

Plaintiffs, laborers on a construction project, sue in their first cause of action to recover the difference between the prevailing rate of wage and the amounts paid to them. Special Term dismissed this cause of action on the ground that the National Housing Act (12 U.S.C. Section 1715(c)) gives no private right of action. While it is quite correct that the statute contains no specific grant of such a right, this is not conclusive. The United States courts have often found an implied right of private suit by a person aggrieved where the statute did not specifically so provide (United States v. Post, 148 U.S. 124; J. J. Case Co. v. Borak, 377 U.S. 426; Jordan Building Corp. v. Doyle O'Connor & Co., 401 F 2d 47; Fischman v. Raytheon Mfg. Co., 188 F 2d 783). Interpreting a similar statute our Court of Appeals held that denial of a right of private suit would be the grant of a right without a remedy, and held the grant implied (Filardo v. Foley Bros., 297 N.Y. 217). Though this case was reversed on other grounds (336 U.S. 281), its principle has not been discredited by the Federal courts.

Order filed.

ORDER OF THE APPELLATE DIVISION GRANTING LEAVE TO APPEAL TO THE COURT OF APPEALS

(SAME TITLE)

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 16, 1974

Present:
Hon. Arthur Markewich, Justice Presiding
Hon. Aron Stuer
Hon. George Tilzer
Hon. Myles J. Lane
Hon. J. Robert Lynch Justices

The above-named defendant-respondent having moved for leave to appeal to the Court of Appeals from the order of this Court entered on March 12, 1974,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit and the statement of Thomas C. Lambert in support of said motion, and the statement of Milton Horowitz in opposition thereto, and after hearing Mr. Thomas C. Lambert for the motion and Mr. Milton Horowitz opposed.

It is ordered that said motion be and the same hereby is granted and this Court, pursuant to CPLR 5713, certifies that the following question of law, decisive of the correctness of its determination, has arisen, which in its opinion ought to be reviewed by the Court of Appeals:

"Is the First Cause of Action pleaded in the Complaint dismissable as a matter of law?"

This Court further certifies that its determination was made as a matter of law and not in the exercise of discretion.

ENTER:
Hyman W. Gamso
Clerk

MAJORITY MEMORANDUM OPINION, DISSENTING OPINIONS AND ORDER OF THE COURT OF APPEALS

(SAME TITLE)

MEMORANDUM:

The order of the Appellate Division should be affirmed and the certified question answered in the negative.

The regulations of subtitle A of title 29 of the Code of Federal Regulations, as adopted by the United States Secretary of Labor and existing during the period in question, evidenced a design and charting of course for the conduct of investigations and hearings in prevailing wage disputes only as the Secretary, in his discretion, deemed appropriate or desirable (see, e.g. 29 CFR, subtit. A, §5.10). There being no exclusive administrative remedy prescribed therein, the aggrieved employees were empowered to enforce by private litigation, the benefits afforded them under the National Housing Act, as set forth in section 1701 *et seq.* of title 12 of the United States Code (cf. *Filardo v. Foley Bros.*, 297 NY 217, revd on other grounds, 336 US 281), even though the regulations, made pursuant to statute, did not explicitly authorize a civil remedy (cf. *J.I. Case Co. v. Borak*, 377 US 426, 432; *Texas & Pacific Ry. v. Rigsby*, 241 US 33, 39; *Jordan Bldg. Corp. v. Doyle, O'Connor & Co.*, 401 F2d 47, 49-50; *Fischman v. Raytheon Mfg. Co.*, 188 F2d 783, 787).

JASEN, J. (dissenting):

I dissent and vote to reverse the order of the Appellate Division and dismiss the first cause of action on the ground that the courts of this state lack the necessary subject matter jurisdiction and may not, therefore, entertain the action.

Plaintiffs are non-union laborers and mechanics who were employed by defendant Mayfair Construction Corp. at various times between August 29, 1962 and May 6, 1964. They had been hired to work on certain construction projects in Manhattan which were financed under the National Housing Act by a building loan insured by the Federal Housing Administration (hereinafter "FHA"). Their complaint in this action alleged two causes of action; only the first of those causes is before us on this appeal. This cause of action is bottomed on the Federal statutory provision which requires that laborers and mechanics employed on construction projects involving federal loan insurance be paid not less than the wages prevailing in the locality for the corresponding classes of laborers and mechanics, as determined by the Secretary of Labor. (U.S. Code, tit. 12, §1715c, subd [a]). Plaintiffs allege that they were paid less than the applicable prevailing wage, and seek to recover the difference.

The relevant factual background of this controversy is set out in neither the Appellate Division opinion, nor the memorandum of this court in which a majority of my colleagues concur. In early 1964, the FHA reviewed Mayfair's payroll and determined that none of the plaintiffs had been paid the appropriate prevailing wage. Plaintiffs concede that this review was made after some of them had made complaints to FHA representatives. As a result of this investigation, the Commissioner ordered that

appropriate restitution be made to the employees. These payments were made by Mayfair's checks dated May 5, 1964, which, in accordance with FHA procedure, were sent to the FHA, which in turn mailed the checks to the individual employees, together with a letter of transmittal. These form letters read as follows:

> "Enclosed is a check in the amount of
> drawn payable to you by your employer at the above named project. The sum represents a reimbursement to you of wages inasmuch as payroll records prepared by your employer indicated that you were paid at an hourly rate less than the rate established for this project by the Secretary of Labor.
>
> This Administration has been in charge of the examination of payroll records for this project and has determined that the check in the amount stated is proper compensation for your work."

All of these checks were promptly cashed. Thereafter, for reasons not explained in the record, nine of the plaintiffs received additional checks, dated August 24, 1964, accompanied by the same FHA form letter of transmittal. However, on the reverse side of each of these checks, the following endorsement was printed: "The undersigned acknowledges and agrees that the acceptance of this check constitutes payment in full and a complete and general release of all claims against Mayfair Construction Corp." These checks likewise were accepted and cashed promptly.

Under regulations promulgated by the Secretary of Labor, "[t]he Agency Head may, in appropriate cases where violations of *** the applicable statutes listed in §5.1 resulting in underpayment of wages to employees are found to be nonwillful, order that restitution be made to such

employees" (29 CFR § 5.10[a], 29 Fed. Reg. 103 [1964]). Those regulations list the National Housing Act as one of the statutes to which this regulation applies (29 CFR § 5.1[a], 29 Fed. Reg. 99 [1964]). Thus, the FHA Commissioner was clearly empowered to act as he did here. Indeed, plaintiffs do not contend otherwise.

Not fully satisfied with this determination by the FHA, the plaintiffs commenced this action on May 11, 1964, less than one week after the first set of checks were sent out. After answering the complaint and asserting certain affirmative defenses, Mayfair moved for an order dismissing the complaint upon the grounds, *inter alia,* that the court did not have subject matter jurisdiction and that the complaint failed to state a cause of action. (CPLR 3211, subd [a], pars 2 and 7.) Supreme Court granted this motion only as to the first cause of action. Its rationale was that the National Housing Act did not give aggrieved employees the right to maintain a private action. The Appellate Division reversed, on the law, and denied defendant's motion to dismiss the first cause of action. It reasoned that the right of aggrieved employees to maintain a private suit was implied, relying on *Filardo v. Foley Bros.* (297 NY 217, revd on other grounds 336 US 281). That same court granted Mayfair's motion for leave to appeal, certifying for our review the following question: "Is the First Cause of Action pleaded in the Complaint dismissable as a matter of law?"

The courts of this state have long recognized the rule that our state courts have no power to revise or review official acts performed by Federal officials acting under authority of acts of Congress and regulations promulgated under such laws. For example, *Matter of Schmoll, Inc. v. Federal Reserve Bank of New York* (286 NY 503) was a case in

which an importer claimed that the Federal Reserve Bank had failed to determine the "buying rate for cable transfers" in a manner directed by Federal statute, and commenced an article 78 proceeding to compel the Federal Reserve Bank to make its determination in the manner provided by law. In affirming a dismissal of the petition on the ground that there was no subject matter jurisdiction, Chief Judge Lehman, writing for the court, acknowledged that many cases could be cited to "sustain the power of a state court acting within the field of its allotted jurisdiction, to enforce rights created by federal statute and to remedy wrongs committed by federal officers under color of authority granted by federal statutes" but observed that "[n]o case has been cited which holds that a state court may go outside that field and control the manner in which a federal agency performs or attempts to perform its functions and duties under the Tariff Act or other federal statute where the Federal government has exclusive jurisdiction." (286 NY at pp 508-509.) While that case might be distinguished from the one before us because of the attempt there to have the state court review directly an action of a Federal officer, subsequent decisions in which reliance was placed upon the rationale of *Schmoll* are more apposite. For example, *Wasservogel v. Meyerowitz* (300 NY 125) involved four summary proceedings to evict tenants for nonpayment of rent. The tenants resisted eviction upon the ground that retroactive rent increases allowed by orders of the Federal Office of Rent Control were improper. This court, in holding that the landlords were entitled to the relief which they sought, noted that "the laws of this State, under the *Schmoll* case and its predecessors, is and was that our state courts have no jurisdiction to review Federal administration orders." (300 NY at p. 134.) There, the tenants also asserted that, unlike

the importer in *Schmoll*, they had no other forum in which to challenge the Federal agency action, claiming that the rent increase must be contested in the state courts or not at all. Significantly, the court did not find that the absence of other review overcame the lack of subject matter jurisdiction, stating that "[t]he courts of this state have never afforded, and do not now afford, any such remedies, whatever the result may be as to preventing suitors from reviewing the acts of Federal officers or agencies." (*Id.*, at p. 134.)

Fieger v. Glen Oaks Vil. (309 NY 527) involved the same Federal agency, the FHA, as in the case now before us. In *Fieger*, certain tenants complained that their landlords, by committing various kinds of wrongs, were able to procure the FHA to insure mortgage loans in excessive amounts, with the result that the rent schedules approved by FHA authorities for these tenants were greatly in excess of reasonable rentals. In affirming a dismissal of the complaint, this court stated that, even assuming that the FHA's statutory power to fix maximum rents was for the benefit of tenants, under *Schmoll* and *Wasservogel* the state courts had no power to review the FHA determination for the reason that "[s]uch a determination of the F.H.A. authorities represents Federal governmental action by authorized Federal officers" (*id.*, at p. 533).

This is not to say that in every case where Federal administrative action is in some way involved the state courts are deprived of subject matter jurisdiction. For example, in *Northridge Cooperative Section No. 1 v. 32nd Ave. Const. Corp.* (2 NY2d 514), actions were brought by cooperative corporations after their control had been acquired by tenant-owners, against officers and directors who had held office when the lands were acquired and the buildings

constructed. The tenants alleged various acts of misconduct by the former officers and directors, such as erecting the cooperative apartment house upon land leased at excessive ground rental from another corporation owned and controlled by themselves, letting building contracts at excessive cost to corporations likewise owned and controlled by themselves, altering the plans and specifications while the work was in progress so as to cheapen the apartments which the tenants had contracted to acquire, and other breaches of trust. This court rejected the defendants' contention that FHA approval of the lo[illegible] on the cooperative apartment house gave plenary absolution to whatever breaches of fiduciary obligation may have been committed. Instead the court held that the scope of the FHA's function in this context in no way conflicted with the jurisdiction of the state court which was being invoked, and that the "equitable jurisdiction of the state courts to enforce fiduciary obligations of directors and promoters is interwoven into State corporation law and was not intended to be pre-empted by the National Housing Act." (*Id.*, at pp. 531-532.) Still, the court was careful to point out that the case before it was "not being maintained in derogation of any official act which the Federal Housing Administrator has performed that is binding on these parties." (*id.*, at p. 532).

Although other cases holding that our state courts lack subject matter jurisdiction to review, even in an indirect manner, Federal administrative action could be analyzed at length (e.g., *Franconia Vil. Cooperative v. Lincoln Sav. Bank of Brooklyn*, 22 AD 2d 402; *Rubel v. Linden Towers Cooperative No. 6*, 39 Misc 2d 620), further argument should not be required to demonstrate that our courts do not have jurisdiction of the subject of this action.

In sum, then, since the prosecution of the lawsuit would necessarily call into question the correctness of the FHA Commissioner's 1964 determination, made under the authority of Federal statute and regulation, our state courts are not empowered to review such authorized Federal determinations. Inasmuch as the plaintiffs did seek FHA assistance in their wage-rate dispute, resulting in a determination by the FHA Commissioner as to their "proper compensation", it is unnecessary to decide whether aggrieved employees who had neither sought nor received an FHA determination would be entitled to maintain a private action by an extension of our rationale in *Filardo v. Foley Bros.* (297 NY 217, revd on other grounds 336 US 281, *supra*).

Accordingly, I would reverse.

Breitel, Ch. J. (dissenting):

In addition to the reasons contained in the dissenting opinion, with which I concur, I conclude that plaintiffs are estopped by their failure to exhaust the federal administrative remedy. Not only had they initiated the federal administrative remedy but they partook of its benefits by accepting additional paychecks obtained through the federal agency.

* * * * * * * *

Order affirmed, with costs, in a memorandum. Question certified answered in the negative. All concur except Jasen, J., who dissents and votes to reverse in an opinion in which Breitel, Ch. J., concurs in a separate dissenting memorandum.

Decided February 26, 1976

1964 CODE OF FEDERAL REGULATIONS
TITLE 29—LABOR

PART 5—LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION

* * *

§5.1 Purpose and scope.

The regulations contained in this part are promulgated in order to coordinate the administration and enforcement of the labor standards provisions of each of the following acts by the Federal agencies responsible for their administration; i.e.:

Davis-Bacon Act (40 U.S.C. 276a-276a-7), and as extended to the Federal-Aid Highway Act of 1956 (23 U.S.C. 113).

Copeland Act (40 U.S.C. 276c).

Contract Work Hours Standards Act (secs. 101-106, 76 Stat. 357-360).

National Housing Act (12 U.S.C. 1701q. 1703, 1708-1711, 1713, 1715a, 1715k, 1715(d)(4), 1715v, 1751w, 1715e, 1716, 1743, 1747, 1748b, 1748h-2, 1750g).

Hospital Survey and Construction Act (42 U.S.C. 291h).

Federal Airport Act (49 U.S.C. 114).

United States Housing Act of 1937 (42 U.S.C. 1416).

Housing Act of 1949 (49 U.S.C. 114).

School Survey and Construction Act of 1950 (20 U.S.C. 636).

Defense Housing and Community Facilities and Services Act of 1951 (42 U.S.C. 1592).

Federal Civil Defense Act of 1950 (50 U.S.C. App. 2281).

Area redevelopment Act (sec. 21, 75 Stat. 61).

Delaware River Basin Compact (sec. 15.1, 75 Stat. 714).

[27 F.R. 10119, Oct. 16, 1962]

* * *

§5.6 Enforcement.

(a) It shall be the responsibility of the Federal agency to ascertain whether the stipulations required by §5.5 have been inserted in the contracts. Agencies which do not directly enter into such contracts shall promulgate the necessary regulations or procedures to requrie that the contracts contain the provisions of §5.5 or such modifications thereof which have been approved by the Department of Labor. No payment, advance, grant, loan or guarantee of funds shall be approved by the Federal agency after the beginning of construction unless there is on file with the agency a certification by the contractor that he and his subcontractors have compiled or that there is an honest dispute with respect to the required provisions.

(b) Whenever any contractor or subcontractor is found by the Secretary of Labor or the Agency Head to be in aggravated or wilful violation of the prevailing wage or overtime pay provisions of any of the applicable statutes listed in §5.1, other than the Davis-Bacon Act, such contractor or subcontractor or any firm, corporation, partnership, or association in which such contractor or subcontractor has a substantial interest shall be ineligible for a period of three years (from the date of publication by the Comptroller General of the name or names of said contractor or subcontractor on the ineligible list as

provided below) to receive any contracts subject to any of the statutes listed in §5.1. In cases arising under contracts covered by the Davis-Bacon Act, the ineligibility provision prescribed in that act shall govern.

The Agency Head shall furnish to the Secretary of Labor for transmittal to the Comptroller General the names of the persons or firms who have been found to have disregarded their obligations to employees. The Comptroller General will distribute a list to all Departments of the Government giving the names of such ineligible persons or firms.

* * *

(d) The Federal agency shall make such examination of the certified payrolls and statements as may be necessary to assure compliance with the labor standards stipulations required by the regulations contained in this part and the applicable statutes listed in §5.1. In connection with such examination particular attention should be given to the correctness of classification and disproportionate employment of laborers, helpers or apprentices. Such payrolls and statements shall be preserved by the agency for a period of three years from the date of completion of the contract and shall be produced at the request of the Secretary of Labor at any time during the 3-year period.

(e) In addition to the examination of payrolls and statements required by paragraph (d) of this section, the Federal agency shall cause investigations to be made as may be necessary to assure compliance with the labor standards stipulations required by the regulations contained in this part and the applicable statutes listed in §5.1.

Projects where the contract is of short duration (6 months or less) shall be investigated before the work is accepted, if feasible. In the case of contracts which extend over a long period of time the investigation shall be made with such frequency as may be necessary to assure compliance. Such investigations shall include interviews with employees and examinations of payroll data to determine the correctness of classifications and disproportionate employment of laborers, helpers or apprentices. Complaints of alleged violations shall be given priority and statements, written or oral, made by an employee shall be treated as confidential and shall not be disclosed to his employer without the consent of the employee.

[16 F.R. 4431, May 12, 1951, as amended at 23 F.R. 9673, Dec. 13, 1958]

§5.7 Reports to the Secretary of Labor.

(a) After completion of investigations, the appropriate Federal agency shall, where the violations are wilful or result in underpayments in the amount of $200 or more, transmit to the Secretary of Labor a report of its findings, including information as to restitution made; payments or approvals of loans, grants, guarantees, or subsidies withheld; contract terminations; the names and addresses of employees and contractors or subcontractors affected. The procedure for the withholding of funds under the Davis-Bacon Act shall be in accordance with the Comptroller General's letter of February 28, 1936. A. 34106, which is appended hereto.

(b) No report need be made to the Secretary of Labor where the underpayments total less than $200, if nonwilful, and the Federal agency has required restitution to be made and has received assurance from the contractor of future compliance.

(c) Upon request, the Agency Head shall transmit to the Secretary of Labor such information available to the Agency with respect to contractors and subcontractors, their contracts, and the nature of the contract work as the Secretary may find necessary to the performance of his duties with respect to the labor standards provisions referred to in this part.

(d) Where the contract is terminated by reason of violations of the labor standards a report shall be submitted to the Secretary of Labor and the Comptroller General giving the name and address of the contractor or subcontractor whose right to proceed has been terminated, the name and address of the contractor or subcontractor, if any, who is to complete the work, the amount and number of his contract, and the description of the work he is to perform.

[16 F.R. 4432, May 12, 1951,, as amended at 17 F.R. 11593, Dec. 19, 1952].

* * *

§5.8 Suspension of funds.

In the event of failure or refusal of the contractor or any subcontractor to comply with labor standards stipulations required by the regulations contained in this part and the applicable statutes listed in §5.1, the Federal agency shall take such action as may be necessary to cause the suspension of the payment, advance or guarantee of funds until such time as the violations are discontinued or until sufficient funds are withheld to compensate employees for the wages to which they are entitled.

[16 F.R. 4432, May 12, 1951]

§5.9 Restitution.

(a) The Agency Head may, in appropriate cases where violations of the labor standards stipulations required by

the regulations contained in this part and the applicable statutes listed in §5.1 resulting in underpayment of wages to employees are found to be nonwilful, order that restitution be made to such employees.

(b) In cases where the Agency Head finds substantial evidence that such violations are wilful and in violation of a criminal statute, the Agency Head shall forward the matter to the Attorney General of the United States for prosecution in the facts warrant. In all such cases the Secretary of Labor shall be informed of the action taken.

[16 F.R. 4432, May 12, 1951]

§5.10 Department of Labor investigations.

(a) The Secretary shall cause to be made such investigations as he deems necessary, in order to obtain compliance with the labor standards provisions of the applicable statutes listed in §5.1, or to affirm or reject the recommendations by the Head of an agency for an appropriate adjustment in liquidated damages assessed under the Contract Work Hours Standards Act. Federal agencies, contractors, subcontractors, sponsors, applicants or owners shall cooperate with any authorized representative of the Department of Labor in the inspection of records, in interviews with workers, and in all other aspects of the investigation. Any authorized representative of the Department of Labor under this section is deemed a person designated to aid in the enforcement of the overtime standards required by the Contract Work Hours Standards Act within the meaning of section 104(a) of that Act. A report of the investigation of such representative shall be transmitted to proper officers of the United States, any territory or possession, as the case may be, as required by the aforesaid section 104(a).

(b) In the event of disputes concerning the payment of

prevailing wage rates or proper classifications which involve significant sums of money, large groups of employees, or novel or unusual situations, the Secretary of Labor may, upon request by a Federal agency, direct a hearing to be held. For the purpose of the hearing the Secretary of Labor shall, in writing, designate a hearing examiner who shall, after notice to all interested parties, make such investigation and conduct such hearings as may be necessary and render a decision embodying his findings and conclusions and if wages are found to be due, the amounts thereof. The hearing examiner's decision shall be sent to the interested parties and shall be final unless a petition for review of the decision by the Secretary of Labor is filed by any such parties in quadruplicate with the Chief Hearing Examiner, United States Department of Labor, Washington 25, D.C., within 20 days after receipt thereof. The petition for review must set out separately and particularly each objection asserted. The petition for review and the record which shall include the examiner's decision then shall be certified by the hearing examiner to the Secretary of Labor. The petitioner may file a brief (original and four copies) in support of this petition within the 20-day period and any interested party upon whom the hearing examiner's decision has been served may within 10 days after the expiration of the time for filing the petition for review, file a brief in support of, or in opposition to the hearing examiner's decision. The Secretary of Labor's decision shall be final.

[27 F.R. 10120, Oct. 16, 1962, as amended at 28 F.R. 547, Jan. 22, 1963].

§ 5.11 Rulings and interpretations.

All questions arising in any agency relating to the application and interpretation of the regulations contained in

this part and of the Davis-Bacon Act, as amended, and as extended to the labor standards provisions of the Federal-Aid Highway Act of 1956, of the Copeland and Anti-Kickback Acts, as amended, of the Eight-Hour Laws, as amended, and of the labor standards provisions of the following acts, the National Housing Act, as amended, the Housing Act of 1949, as amended, the Hospital Survey and Construction Act, the Federal Airport Act as amended, the School Survey and Construction Act of 1950, the Defense Housing and Community Facilities and Services Act of 1951, as amended, and the Federal Civil Defense Act of 1950, as amended, shall be referred to the Secretary of Labor for appropriate ruling or interpretation. The rulings and interpretations of the Secretary shall be authoritative and may be relied upon as provided for in section 10 of the Portal-to-Portal Act of 1947. Requests for such rulings and interpretations should be addressed to the Secretary of Labor, United States Department of Labor, Washington 25, D.C.

[23 F.R. 9673, Dec. 13, 1958]

* * *

Court, U. S.
FILED
JUN 21 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

75-
No. 1689

MAYFAIR CONSTRUCTION CORP.,
Petitioner.

-against

FREDDIE BODRICK, ALLEN CORBETT, WILEY C. DUNBAR, JOSEPH T. DOBIE, MARION JAMES HOLLINS, HUBERT LAWTON, LARRY LYTTLE, MELVIN PLUMMA, WILLIE REYNOLDS, WILLIAM BAKER, FRANK BRISBANE, JAMES BRISBANE, SR., JAMES A. BRISBANE, JR., MARION CALDWELL, RODELL GRAHAM, JOSEPH N. GRAHAM, MANFORD GREGORY, JAMES HARRIS, MATTHEW HAZELTON, HEROD JONES, ROBERT E. LEROY, CHARLES LUTTREL, JR., WILLIE A. MARCHELL, SAMUEL MARSHALL, PAUL MILLER, CHARLES PEAY, LEO ROBINSON, NEAL WILLIAMS, and other employees of petitioner similarly situated,
Respondents.

Respondent's Brief

MILTON HOROWITZ
Counsel for Respondents
15 Park Row
New York, N.Y. 10038

SAMUEL PANZER
On the Brief

DICK BAILEY PRINTERS, 290 Richmond Ave., Staten Island, N.Y. 10302
Telephone: (212) 447-5358

TABLE OF CONTENTS

	Page
Questions presented	2
Statutes Involved	3
Statement of the Case	4
Reasons for Granting the Writ	8
Conclusion	11
Appendix	
1940 Amendment of Eight Hour Law	1a
Contract Work Hours Standards Act of 1962	2a

CITATIONS

Cases:

Bodrick v. Mayfair Construction Corp., —N.Y. 2d— (1976) affirming 44 App.Div.2d 520; 353 N.Y.S.2d 158 (1974) . 7,8

Chambers v. Florence Construction Co., 79 F.Supp. 845 (D.C. Ga. 1948) 10

Filardo v. Foley Bros., 297 N.Y. 217 (1948), *reversed* sub nom. *Foley Bros. v. Filardo*, 336 U.S. 281 (1949) .. 2,3,4,7,8

Schulte Co. v. Gangi, 328 U.S. 108 (1948) 7

Willis v. duPont de Nemours & Co., 171 F.2d 51 —10 Cir. 1948) 10

Statutes and Regulations:

Contract Work Hours Standards Act of 1962, Public Law 87-58, Tit. I, §§ 101-106; 76 Stat. 357-359; 40 U.S.C. §§ 327-332 ..... 4,8,10,11,2a-10a

Statutes and Regulations (cont'd) *Page*

Davis-Bacon Act, March 3, 1931, c. 411, § 1, *et seq.*, as amended; 46 Stat. 1494, as amended; 40 U.S.C. § § 276a-1—276a-7 11

Eight Hour Law, September 9, 1940 amendment, C.717, Tit. III, sec. 303; 54 Stat. 884; 40 U.S.C. § 325a ... 2,4,6,8,1a

National Housing Act, prevailing wage section, added June 3, 1939, c. 175, § 212(a), as amended; 53 Stat. 807, § 212(a), as amended; 12 U.S.C. § 1715c(a) 2,3,6

July 2, 1964 amendment, Public Law 88-349; 78 Stat. 238 6

Reorganization Plan No. 14 of 1950, May 24, 1950, 15 F.R. 3175, 64 Stat. 1267 2

29 CFR, subtitle A, § 5.10 4,7

IN THE

Supreme Court of the United States

October Term, 1975

No. 1689

MAYFAIR CONSTRUCTION CORP.,
Petitioner.

-against

FREDDIE BODRICK, ALLEN CORBETT, WILEY C. DUNBAR, JOSEPH T. DOBIE, MARION JAMES HOLLINS, HUBERT LAWTON, LARRY LYTTLE, MELVIN PLUMMA, WILLIE REYNOLDS, WILLIAM BAKER, FRANK BRISBANE, JAMES BRISBANE, SR., JAMES A. BRISBANE, JR., MARION CALDWELL, RODELL GRAHAM, JOSEPH N. GRAHAM, MANFORD GREGORY, JAMES HARRIS, MATTHEW HAZELTON, HEROD JONES, ROBERT E. LEROY, CHARLES LUTTREL, JR., WILLIE A. MARCHELL, SAMUEL MARSHALL, PAUL MILLER, CHARLES PEAY, LEO ROBINSON, NEAL WILLIAMS, and other employees of petitioner similarly situated,
Respondents.

RESPONDENTS' BRIEF

For reasons quite variant from Petitioner's (hereinafter "Mayfair"), Respondents join with Mayfair in its prayer

that a writ of certiorari issue to review the final order herein of the Court of Appeals of the State of New York entered on February 26th, 1976. We accept Mayfair's references to the opinions, orders and reports of the case below, the jurisdictional statement, and the citation of the statutes involved.

QUESTIONS PRESENTED

1. Whether the National Housing Act's prevailing wage section 212(a), as amended; 53 Stat. 807, sec. 212(a), as amended; 12 U.S.C. §1715c, enacted June 3, 1939 prior to the adoption of Reorganization Plan No. 14 of 1950 (May 24, 1950, 15 F.R. 3175; 64 Stat. 1267) and the promulgation of Regulations thereunder by the Secretary of Labor covering, *inter alia,* the administration of that prevailing wage section, although silent from inception to the present day as to enforcement, whether judicially or administratively, implies the grant of a remedy of private judicial suit for recovery of the prevailing wage by the covered mechanics and laborers?

In 1949 this Court reversed *Filardo v. Foley Bros.*, 297 N.Y. 217 (1948) for its attempt to give extraterritorial application to the Eight Hour Law amendment of September 9, 1940, c. 717, Title III, §303; 54 Stat. 884; 40 U.S.C. §325a, strikingly analogous in substantively providing for overtime premium pay while omitting any express reference to an enforcement remedy, 336 U.S. 281, 290, 291:

> "Since we decide that the Eight Hour Law is inapplicable to a contract for the construction of public works in a foreign country over which the United States has no direct legislative control, it is unnecessary to decide whether the law either

> directly or via the third party beneficiary contract route, gives an employee who is covered by it a cause of action against his employer for overtime wages."

As far as we know the instant case represents the very first adjudication of judicial enforcement of the prevailing wage section of the National Housing Act in the thirty-seven years of its existence, nor has this Court had occasion to rule upon what it left open in *Filardo.* The case therefore comes squarely within Rule 19(1)(a) of the Rules of this Court as an instance, "Where a state court has decided a federal question of substance not theretofore determined by this court, * * *";

2. Whether the Court of Appeals of the State of New York properly decided that a form transmittal letter of the Federal Housing Administration (hereinafter "FHA") stating, *inter alia,* that "This Administration has been in charge of the examination of payroll records for this project and has determined that the check in the amount stated is proper compensation for your work.", was the application of a non-exclusive administrative remedy not barring the pursuit of the judicial statutory remedy?

The larger question embodied in that ruling is whether a state trial court, in the exercise of federal question jurisdiction not exclusively mandated to the federal courts, can take the same action with respect to the acts of a federal administrative agency that a federal district court is empowered to do.

STATUTES INVOLVED

In addition to the text of section 212(a), the prevailing wage section of the National Housing Act (53 Stat. 807, Sec. 212(a), as amended; 12 U.S.C. §1715c(a)) as it stood

in the period August 1962 through May 1964 (Pet. 4,5),[1] and of the Regulations of the Secretary of Labor, 29 CFR, Part 5 (Pet. 21a-28a), we append the texts of the Contract Work Hours Standards Act of August 13, 1962, 76 Stat. 357-360; 40 U.S.C. §§327-332; and also that section of the Eight Hour Law dealt with by *Filardo v. Foley Bros.*, 297 N.Y. 217 (1948), *reversed, Foley Bros. v. Filardo*, 336 U.S. 281 (1949), *viz.*, the September 9, 1940 amendment, c. 717, Title III, §303; 54 Stat. 884; 40 U.S.C. §325a.

STATEMENT OF THE CASE

Our view of the facts of this case, which will be seen to be borne out by the record should this Court grant review, is at considerable variance from Mayfair's. In the employer's high rise apartment building construction project financed by FHA guaranteed loans, the Secretary of Labor had, "prior to the beginning of construction", made the various prevailing wage determinations for the project with the lowest scheduled wage, for the classification of "laborer", fixed at $3.95 per hour and with overtime premium at time and one-half for hours worked in excess of eight in a day or forty in a week. Respondents, all black, euphemistically described as "non-union laborers and mechanics" in the dissent of Jasen, J. (Pet. 14a), were hired at the flat rate of $2.00 per hour excepting for three or four leadmen who received $2.50 to $2.75 per hour — and none of respondents ever got a penny of premium pay for overtime even though leadman Peay averaged over 60 hours per week over a nearly two year period.

The period of respondents' employment with Mayfair was between mid-August 1962 and May 6, 1964. Earlier in the latter year employee spokesmen complained to

1. References are to pages of the Petition for Certiorari herein.

Government inspectors about being underpaid. The upshot was that Mayfair drew a series of checks for all of the respondents, all dated May 5, 1964, which were transmitted to the respondents under the FHA's form covering letter set forth in page 7 of the petition. Late in April 1964 respondents' counsel, Mr. Panzer, had written to the FHA of his intention to start suit for additional moneys and requesting the FHA's care that the checks not bear words of release by endorsement. Contrary to page 7 of the petition, none of the May 1964 checks bore words of release by endorsement, and suit was started within a few days thereafter. May 6, 1964 was the last day that any respondent worked for Mayfair.

It was not until September 1964, months after the commencement of suit, that nine additional checks of Mayfair, each dated August 24, 1964 and this time bearing the language of release by endorsement, were sent out to nine of the respondents with the same FHA form letter.

Several years later, when counsel was first allowed access to Mayfair's payroll records, the ledgers all showed erasures of the original classification of "laborer" and an overtyping of the words "porter - cleaner". That magical qualities were attributed to the latter words by Mayfair's president Litwin is apparent, "* * * further * * * plaintiffs were not employed as laborers but as porters and cleaners and thus defendant did not violate the National Housing Act * * *."

A computation prepared by respondents' counsel from Mayfair's ledger sheets, checked and corrected by Mayfair's bookkeeping personnel, shows an aggregate underpayment from the prevailing wage established for "laborer" of $62,480.63—this with full credit for all payments, inclusive of the additional payments covered by

the FHA form transmittal letters. Hence, factually, the demonstration is exact as to the degree of violation of the minimum prevailing wage determination — the true administrative determination — of $3.95 per hour for "laborer" established by the Secretary of Labor for the project before the beginning of construction. Only the boilerplate of a mimeographed form transmittal letter, "This Administration has been in charge of the examination of payroll records for this project and has determined that the check in the amount stated is proper compensation for your work.", stands in the way of a clearcut, unassailable judicial adjudication. But state trial courts, in the exercise of their important federal question jurisdiction, are frequently diffident at seeming to interfere, conflict or meddle with federal administrative agencies, denying to themselves the powers of federal district courts even where the jurisdiction, and the consequent judicial duty, may be to exercise a concurrent or *de novo* jurisdiction; and the failure to do so, a judicial error.

Thus the trial court, sitting as Special Term, avoided coming to grips with the FHA's form letters by finding that National Housing's prevailing wage section did not provide a private judicial remedy until a 1964 amendment[2] which came "too late" to apply to these respondents (Pet. 5a-8a).

The issue of whether there was a binding administrative adjudication likewise escaped official attention in the intermediate appeals court, the Appellate Division of the State Supreme Court, which contented itself with a reversal based on the finding that the prevailing wage section of National Housing, like the Eight Hour Law as treated by

2. Public Law 88-349 enacted July 2, 1964; 78 Stat. 238. Reading National Housing's section 212(a) as it stood at enactment in 1939 and as it stands today, shows it to be as barren of mention of a remedy, administrative or judicial, today as it was at enactment.

Filardo v. Foley Bros., supra, implied the grant of a private judicial remedy.

Only in the New York Court of Appeals did the Court come to grips with the issue of whether there had been an exercise of a lawfully binding administrative determination, as well as actionability under the National Housing Act[3]. In our view the *per curiam* opinion of the majority is precisely correct in discerning a wholly discretionary power, not exercised here, in the Secretary of Labor (*not* in the FHA Commissioner) to make binding administrative determinations after adversary hearings and with an appropriate line of review (29 CFR, subtit. A, §5.10; Pet. 26a); and because that discretion had not been exercised, there had been no exercise of an exclusive administrative remedy such as would bar these aggrieved respondents from freely pursuing the remedy whose grant was implied by the statute.

Still the language of the *per curiam* opinion is cryptic. Worse, it makes no real effort to explain its application or to rebut Judge Jasen's awesome looking dissent: a dissent which accepts a fictitious and non-existent "order" of the Federal Housing Commissioner for the purpose of defeating the true administrative determination of the Secretary of Labor fixing the prevailing wage of respondents at $3.95 per hour and overtime premium under a statute giving these respondents the right to effect collection in suit. Why the bland language of a form letter covering a legally voluntary restitution payment by employer to employee—about as legally potent a document as

3. A third issue regarding the validity of the nine additional checks of August 24, 1964 as releases by endorsement even though drawn in amounts less than the unpaid balance of prevailing wage was only mentioned in passing in Judge Jasen's dissent (Pet. 15a). See *Schulte Co. v. Gangi,* 328 U.S. 108 (1948).

a laundry ticket—should draw such awed attention from the State judiciary is a testimony to a diffidence that is widespread and could benefit from the instruction of this Court.

REASONS FOR GRANTING THE WRIT

1. In 1949 when this Court, 336 U.S. 281, reversed *Filardo v. Foley Bros.*, 297 N.Y. 217 (1948), for the attempt of the New York State Court of Appeals to give extraterritorial application to the Eight Hour Law (as amended September 9, 1940, c. 717, Title III, §303; 54 Stat. 884, Tit. III, sec. 303; 40 U.S.C. §325a), it expressly left open the question of whether that statute, silent as to remedy, nevertheless by direct implication or via the third party beneficiary route, afforded an employee a suit against his employer for the recovery of his mandated wages. No ruling on this question has ever been made by this Court and, until the New York courts again applied *Filardo* in the instant case dealing with the highly analogous situation of National Housing's prevailing wage section, neither had that section, enacted in 1939, ever been authoritatively interpreted with regard to judicial enforcement. Thirty-seven years is, of course, maturity enough for an important item of legislation which, as petitioner has pointed out, can hardly be said to stand in isolation, to receive an authoritative interpretation from this Court.

Interestingly enough, the Eight Hour Law, the subject of *Filardo's* attention, was repealed in August 1962. Its successor, the Contract Work Hours Standards Act, enacted August 13, 1962, 76 Stat. 357-360; 40 U.S.C. §327-332, set forth in the appendix to this Brief, in repealing the Eight Hour Law, not only incorporated *Filardo's* holding with respect to private judicial suit (Sec. 102(b)(1) and (2), but extended coverage to include both

the public construction projects hitherto covered by the Eight Hour Law, and other projects given Government aid in the form of loans, grants, insurance or loan guarantees under statutes providing wage standards for such work, Sec. 103(a)(3).

Since the Contract Work Hours Standards Act of 1962, enacted before the hire of any of the respondents, therefore covers at least the overtime features of FHA's prevailing wage projects, not to give the base pay portion of a prevailing wage claim the same right to a judicial remedy as the overtime portion of the same claim would indeed be anomalous. We think that, in allowing suit for recovery of unpaid wages in overtime violations, the Contract Work Hours Standards Act assumes, correctly, that the underlying basic prevailing wage statute is in concordance as to remedy.

2. Petitioner lays great stress on what it regards as the binding administrative determination of the FHA's form transmittal letter and so, of course, did the dissenting opinions of Breitel, Ch. J., and Jasen, J. Judge Jasen's opinion explicitly views the majority action of his Court as an unwarranted State interference with federal administrative action reviewable, if at all, by exclusively federal authority Needless to say, our disagreement is complete.

We feel that this case affords a much needed vehicle to assure state courts, in the exercise of their federal question jurisdiction, that their duty, in proper case, is to adjudicate federal law; that if the jurisdiction conferred on a federal district court is to adjudicate the facts of a case *de novo* without the estoppel or bar of the mimeographed form transmittal letter of a federal administrative agency, the same jurisdiction properly fastened on a state court of

original jurisdiction makes its duties and powers no less than that of its federal court counterpart.

This case is purely federal in its substance. But strong authority indicates that with no single wage claim reaching the $10,000.00 jurisdictional minimum, and with aggregation of claims for jurisdictional purposes unavailable, the resort to the state courts was a matter of necessity.

Willis v. E.I. duPont de Nemours & Co., 171 F.2d 51 (10 Cir. 1948)

Chambers v. Florence Construction Co., 79 F. Supp. 845 (D.C. Ga. 1948)

Whether the state courts have a federal case because the district courts have no jurisdiction or because a defendant makes no timely application to remove hardly matters; the state court is burdened with a duty, ultimately answerable here, to make proper adjudication of the case and not to shrug off an evaluation of the legal significance of administrative action where the strong policy of a remedial statute demands that the judiciary evaluate the facts.

The majority opinion of the Court of Appeals of the State of New York correctly directs that the trial court proceed with the action and refuses to treat the transmittal letter as a bar; but the cryptic quality of the opinion deprives the parties and the public of the greater detail needed commensurate with the importance of its decision.

We feel that the form letter of the FHA is not the stuff upon which Mayfair's defense of collateral estoppel — asserted years after its answer had been filed — can be supported. Other federal statutes mince no words about covered laborers' rights to institute lawsuits for the shortfalls of administrative collection and the Contract Work Hours Standards Act's section 104(b), applying at

the very least to FHA project overtime claims, directly copies that provision from the Davis-Bacon Act of 1931, as amended; 46 Stat. 1494, as amended; 40 U.S.C. §§276a-1 — 276a-7. Even more important is the explicit provision of Sec. 102(b)(2) of the Contract Work Hours Standards Act that makes the administrative remedies available "in addition" to a primary remedy where the employer is made "liable to such affected employee for his unpaid wages".

CONCLUSION

Touching base in so many vitally important areas of prevailing wage legislation not hitherto authoritatively dealt with by this Court, this case presents a truly worthwhile opportunity for significant and important review by this Court. We join with petitioner in respectfully urging a grant of the writ.

MILTON HOROWITZ
Counsel for Respondents
15 Park Row
New York, N.Y. 10038

Dated: New York, N.Y.
June 17, 1976

SAMUEL PANZER,
On the Brief.

Appendix

Eight Hour Law, 40 Hour Overtime Provision C.717, Tit. III, Sec. 303; 54 Stat. 884; 40 U.S.C. §325a, Approved September 9, 1940

SEC. 303. Notwithstanding any other provision of law, the wages of every laborer and mechanic employed by any contractor or subcontractor engaged in the performance of any contract of the character specified in the Act of June 19, 1912 (37 Stat. 138; U.S.C., title 40, secs. 324, 325), shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day shall be permitted upon compensation for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay.

Contract Work Hours Standards Act of August 13, 1962, Public Law 87-581, Secs. 101-106; 76 Stat. 357; 40 U.S.C. §§327-332.

AN ACT

To establish standards for hours of work and overtime pay of laborers and mechanics employed on work done under contract for, or with the financial aid of, the United States, for any territory, or for the District of Columbia, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That this Act may be cited as the "Work Hours Act of 1962" and title I may be cited as the "Contract Work Hours Standards Act".

Sec. 2. As used in this Act, the term "this Act" means the Work Hours Act of 1962 except in title I, where it means the Contract Work Hours Standards Act.

TITLE I—CONTRACT WORK HOURS STANDARDS ACT

"Secretary"

Sec. 101. As used herein, the term "Secretary" means the Secretary of Labor, United States Department of Labor.

Forty-hour week provision

Sec. 102. (a) Notwithstading any other provision of law, the wages of every laborer and mechanic employed by any contractor or subcontractor in his performance of work on

any contract of the character specified in section 103 shall be computed on the basis of a standard workday of eight hours and a standard workweek of forty hours, and work in excess of such standard workday or workweek shall be permitted subject to the provisions of this section. For each workweek in which any such laborer or mechanic is so employed, such wages shall include compensation, at a rate not less than one and one-half times the basic rate of pay, for all hours worked in excess of eight hours in any calendar day or in excess of forty hours in the workweek, as the case may be.

(b) The following provisions shall be a condition of every contract of the character specified in section 103 and of any obligation of the United States, any territory, or the District of Columbia in connection therewith;

(1) No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any laborer or mechanic, in any workweek in which he is employed on such work, to work in excess of eight hours in any calendar day or in excess of forty hours in such workweek except in accordance with the provisions of this Act; and

Liability of employers for violation.

76 STAT. 357. 76 STAT. 358.

(2) In the event of violation of the provisions of paragraph (1), the contractor and any subcontractor responsible therefor shall be liable to such affected employee for his unpaid wages and shall, in addition, be liable to the United States (or, in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory) for liquidated damages as provided therein. Such liquidated damages shall be

computed with respect to each individual employed as a laborer or mechanic in violation of any provision of this Act, in the sum of $10 for each calendar day on which such individual was required or permitted to work in excess of eight hours or in excess of the standard workweek of forty hours without payment of the overtime wages required by this Act. The governmental agency for which the contract work is done or by which financial assistance for the work is provided may withhold, or cause to be withheld, subject to the provisions of section 104, from any moneys payable on account of work performed by a contractor or subcontractor, such sums as may administratively be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as herein provided.

Contracts, applicability.

Sec. 103. (a) The provisions of this Act shall apply, except as otherwise provided, to any contract which may require or involve the employment of laborers or mechanics upon a public work of the United States, of any territory, or of the District of Columbia, and to any other contract which may require or involve the employment of laborers or mechanics if such contract is one (1) to which the United States or any agency or instrumentality thereof, any territory, or the District of Columbia is a party, or (2) which is made for or on behalf of the United States, any agency or instrumentality thereof, any territory, or the District of Columbia, or (3) which is a contract for work financed in whole or in part by loans or grants from, or loans insured or guaranteed by, the United States or any agency or instrumentality thereof under any statute of the United States providing wage standards for such work: *Provided*, That the provisions of section 102, shall not

apply to work where the assistance from the United States or any agency or instrumentality as set forth above is only in that nature of a loan guarantee, or insurance. Except as otherwise expressly provided, the provisions of the Act shall apply to all laborers and mechanics, including watchmen and guards, employed by any contractor or subcontractor in the performance of any part of the work contemplated by any such contract, and for purposes of this Act, laborers and mechanics shall include workmen performing services in connection with dredging or rock excavation in any river or harbor of the United States or of any territory or of the District of Columbia, but shall not include any employee employed as a seaman.

(b) This Act shall not apply to contracts for transportation by land, air, or water, or for the transmission of intelligence, or for the purchase of supplies or materials or articles ordinarily available in the open market. This Act shall not apply with respect to any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act (49 Stat. 2036; 41 U.S.C. 35-45).

Coordination of enforcement by Federal agencies.

76 STAT. 358. 76 STAT. 359.

Sec. 104 (a) Any officer or person designated as inspector of the work to be performed under any contract of the character specified in section 103, or to aid in the enforcement or fulfillment thereof shall, upon observation or investigation, forthwith report to the proper officer of the United States, of any territory or possession, or of the District of Columbia, all violations of the provisions of this Act occurring in the performance of such work, together with the name of each laborer or mechanic who was required or permitted to work in violation of such provisions and the day or days of such violation. The

amount of unpaid wages and liquidated damages owing under the provisions of this Act shall be administratively determined and the officer or person whose duty it is to approve the payment of moneys by the United States, the territory, or the District of Columbia in connection with the performance of the contract work shall direct the amount of such liquidated damages to be withheld for the use and benefit of the United States, said territory, or said District, and shall direct the amount of such unpaid wages to be withheld for the use and benefit of the laborers and mechanics who were not compensated as required under the provisions of this Act. The Comptroller General of the United States is hereby authorized and directed to pay directly to such laborers and mechanics, from the sums withheld on account of underpayments of wages, the respective amounts administratively determined to be due, if the funds withheld are adequate, and, if not, an equitable proportion of such amounts.

(b) If the accrued payments withheld under the terms of the contracts, as aforesaid, are insufficient to reimburse all the laborers and mechanics with respect to whom there has been a failure to pay the wages required pursuant to this Act, such laborers and mechanics shall, in the case of a departi. :nt or agency of the Federal Government, have the rights of action and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials, and in such proceedings it shall be no defense that such laborers and mechanics accepted or agreed to accept less than the required rate of wages or voluntarily made refunds.

Right to appeal.
72 Stat. 967.

(c) Any contractor or subcontractor aggrieved by the withholding of a sum as liquidated damages as provided in this Act shall have the right, within sixty days thereafter, to appeal to the head of the agency of the United States or of the territory for which the contract work is done or by which financial assistance for the work is provided, or to the Commissioners of the District of Columbia in the case of liquidated damages withheld for the use and benefit of said District. Such agency head or Commissioners, as the case may be, shall have authority to review the administrative determination of liquidated damages and to issue a final order affirming such determination; or, if it is found that the sum determined is incorrect or that the contractor or subcontractor violated the provisions of this Act inadvertently notwithstanding the exercise of due care on his part and that of his agents, recommendations may be made to the Secretary that an appropriate adjustment in liquidated damages be made, or that the contractor or subcontractor be relieved of liability for such liquidated damages. The Secretary shall review all pertinent facts in the matter and may conduct such investigations as he deems necessary, so as to affirm or reject the recommendation. The decision of the Secretary shall be final. In all such cases in which a contractor or subcontractor may, within sixty days after such final order, file a claim in the Court of Claims: *Provided, however,* That final orders of the agency head, the Commissioners of the District of Columbia or the Secretary, as the case may be, shall be conclusive with respect to findings of fact if such findings are supported by substantial evidence.

(d) Reorganization Plan Numbered 14 of 1950 (15 F.R. 3175; 64 Stat. 1267) shall be applicable with respect to the

provisions of this Act, and section 2 of the Act of June 13, 1934, as amended (48 Stat. 948, 54 Stat. 1236, 63 Stat. 108; 40 U.S.C.276c), shall be applicable with respect to those contractors and subcontractors referred to therein who are engaged in the performance of contracts subject to the provisions of this Act.

Limitations, exemptions.

Sec. 105. The Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act as he may find necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment of the conduct of Government business.

Violations.

76 STAT. 359. 76 STAT. 360.

Sec. 106. Any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed in the performance of any work contemplated by any contract to which this Act applies, who shall intentionally violate any provision of this Act, shall be deemed guilty of a misdemeanor, and for each and every such offense shall, upon conviction, be punished by a fine of not to exceed $1,000 or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof.

TITLE II—MISCELLANEOUS AND EFFECTIVE DATE

5 USC 673c.

Sec. 201. The proviso of section 23 of the Act of March 28, 1934 (48 Stat. 509, 522), as amended, is hereby amended to read as follows: "*provided,* That the regular hours of labor are hereby established at not more than eight per day or forty per week, but work in excess of such hours shall be permittrd when administratively determined to be in the public interest: *Provided further,* That overtime work in excess of eight hours per day or in excess of forty hours per week shall be compensated for at not less than time and one-half of the basic rate of compensation, except that employees subject to this section who are regularly required to remain at or within the confines of their post of duty in excess of eight hours per day in a standby or on-call status shall be paid overtime rates only for hours of duty, exclusive of eating and sleeping time, in excess of forty per week."

62 STAT. 942.

Sec. 202. (a) Section 1499 of title 28, United States Code, is hereby amended to read as follows:

"1Liquidated damages withheld from contractors. under Contract Work Hours Standards Act

Ante, p. 358.

"The Court of Claims shall have jurisdiction to render judgment upon any claim for liquidated damages withheld from a contractor or subcontractor under section 104 of the Contract Work Hours Standards Act."

37 STAT. 137. 62 STAT. 989.

(b) The Court of Claims shall continue to have jurisdiction to render judgment upon any claim for a

penalty withheld from a contractor or subcontractor under section 324 of title 40, United States Code, in connection with any contract subject to said section existing on the ffective date of this Act, or thereafter entered into pursuant to invitations for bids that are outstanding at the time of the enactment of this Act.

Repeals.

Sec. 203. The following statutes are hereby repealed: Sections 1 and 2 of the Act of August 1, 1892 (27 Stat. 340; 40 U.S.C. 321, 322), as amended by the Act of March 3, 1913 (37 Stat. 726); sections 892 and 893 of the Act of March 3, 1901 (31 Stat. 1334; D.C. Code, 1961 edition, secs. 22-3407, 3408); the Act of June 19, 1912 (37 Stat. 137; 40 U.S.C. 324, 325), as amended by the Act of June 25, 1948 (62 Stat. 989); that portion of the Naval Service Appropriation Act, 1918 (Act of March 4, 1917, 39 Stat. 1192), which is codified as section 326 of title 40 of the United States Code (1952 edition); and section 303 of the Second Supplemental Defense Appropriations Act, 1941 (54 Stat. 884; 40 U.S.C.325a). The provisions of such statutes shall, notwithstanding, continue to apply with respect to contracts existing on the effective date of this Act or en.:red into pursuant to invitations for bids that are outstanding at the time of the enactment of this Act.

Effective date.

Sec. 204. This Act shall take effect sixty days after its enactment, but shall not affect any contract then existing or any contract that may thereafter be entered into pursuant to invitations for bids that are outstanding at the time of the enactment of this Act.

Approved August 13, 1962, 11:46 a.m.